

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in October 2008

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	DISCIPLINE; MOOT; RUMORS; ILLUSORY; TIMELINESS; REPRISAL; THREAT
<u>CASE STYLE:</u>	<u>RIEDEL, PHD v. WEST VIRGINIA UNIVERSIT</u> DOCKET NO. 07-HE-026 (10/31/2008)
<u>PRIMARY ISSUES:</u>	Whether letters placed in Grievant's personnel file were disciplinary, and whether they should be removed from the personnel file? Whether the grievance was timely filed? Whether the grievance was moot? Whether Grievant was subject to reprisal, and whether he was subject to an improper administrative threat?
<u>SUMMARY:</u>	<p>This grievance challenges several different actions. Most of these actions were taken by Dr. Diana Beattie, Chair of the Department of Biochemistry, or alleged by Grievant to have been taken by Dr. Beattie. Dr. Beattie has retired from WVU, rendering several issues moot. Two of the complaints requested as relief reimbursement for expenses or personnel costs, which relief had already been granted, rendering these complaints moot. Many of the complaints were not timely filed. The remaining claims of reprisal and an administrative threat were not proven.</p> <p>Grievant requested that three letters placed in Grievant's personnel file be removed from his file. The first two letters did not impose any discipline upon Grievant, but they did document complaints and counseled him regarding his behavior, copies were sent to senior administrators at WVU, and the letters were placed in Grievant's personnel file. For purposes of determining the burden of proof in a grievance proceeding, these letters were disciplinary in nature. Respondent did not contest Grievant's request that the first letter be removed from his personnel file, and did not prove the complaints in the second letter were valid. Respondent proved the charges in the third letter. Grievance GRANTED IN PART, AND DENIED IN PART.</p>

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: DEFAULT; CHIEF ADMINISTRATOR; LEVEL ONE; FAILURE TO RESPOND; PROPER FILING

CASE STYLE: WILLIAMS v. SOUTH BRANCH CAREER AND TECHNICAL CENTER
DOCKET NO. 2008-1352-SBCTCDEF (10/23/2008)

PRIMARY ISSUES: Did default occur when Grievant filed his level one grievance with Respondent's Attorney, but not with his chief administrator, and no level one proceeding was conducted?

SUMMARY: Grievant filed a written notice of default at level one of the grievance procedure based on the failure of Respondent to schedule a level one hearing. The parties submitted this issue on the record based on stipulated facts. These facts indicate that counsel for Grievant filed grievance forms with the Grievance Board on or about February 27, 2008. On that same date, a copy of the grievance was submitted to counsel for Respondent. West Virginia Code requires that an employee file a written grievance with the chief administrator stating the nature of the grievance, the relief requested, and requesting either a conference or hearing. It is undisputed that the grievance was not filed with the Director of the South Branch Career and Technical Center. Pursuant to the statutory grievance procedure, no default occurred, because the chief administrator was not notified as required by proper filing. Default DENIED.

KEYWORDS: DEFAULT; WAIVER

CASE STYLE: BROWNING v. LOGAN COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0567-LOGEDDEF (10/24/2008)

PRIMARY ISSUES: Whether Respondent was relieved of the obligation to render a level one decision within the applicable time-frame when the record establishes Grievant did not agree to waive the time constraint.

SUMMARY: Grievant alleges she is entitled to prevail by default in a grievance filed against her employer, Respondent Logan County Board of Education. Grievant contends Respondent is in violation of W. Va. Code § 6C-2-4, in that a Level One decision was not rendered within fifteen days after the Level One hearing. Respondent acknowledges the excess in time but argues Grievant waived applicable time constraint by not objecting to its request for waiver. Grievant denies she or her representative granted a waiver. Respondent did not establish that Grievant waived the applicable time limit for issuing a Level One decision. Accordingly, Grievant's claim for default is Granted.

KEYWORDS: IMPROVEMENT PLAN; SUSPENSION; LESSON PLANS; EVALUATION; DISCRIMINATION

CASE STYLE: WAGGONER v. CABELL COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-1570-CABED (10/31/2008)

PRIMARY ISSUES: Whether Grievant should have received a suspension and Improvement Plan for his repeated failure to have lesson plans.

SUMMARY: Grievant failed to have his lesson plans during three observations. He received counseling, a written reprimand, and then a one day suspension for insubordination, and on his evaluation he was marked unsatisfactory in "Instructional Management System." Grievance DENIED.

KEYWORDS: TERMINATION, DISMISSAL, INSUBORDINATION, IMMORALITY, CREDIBILITY

CASE STYLE: FULMER v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 05-20-244 (10/29/2008)

PRIMARY ISSUES: Whether Grievant committed immoral and insubordinate acts for which his employment should be terminated.

SUMMARY: Grievant's employment was terminated by Respondent on the basis of an accusation by a student of inappropriate, immoral conduct. Respondent failed to meet its burden of proving that Grievant engaged in such conduct. Respondent's accusing witness was not credible, and it provided no corroborating evidence from a credible source. Accordingly, the grievance is Granted.

KEYWORDS: TIMELINESS; DISCOVERY

CASE STYLE: VAN SCYOC v. MONONGALIA COUNTY BOARD OF EDUCATION

DOCKET NO. 07-30-328 (10/14/2008)

PRIMARY ISSUES: Whether grievance was timely when Grievant discovered Respondent allowed other employees to adjust their work schedules to obtain various certifications 2 years after Grievant was required to take a leave of absence without pay.

SUMMARY: Grievant filed a grievance alleging Respondent engaged in discrimination and favoritism by not allowing her to adjust her work schedule to obtain a counseling certificate approximately 2 years after Grievant took a leave of absence to complete the program requirements. Grievant discovered in 2007 another employee was permitted to adjust her work schedule so as to complete an internship. Grievant filed her grievance outside the required 15 day time period. Grievance denied as untimely.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: "STEP UP"; SENIORITY; SUBSTITUTE, ABSENT EMPLOYEE

CASE STYLE: BOWLES v. PUTNAM COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0313-PUTED (10/31/2008)

PRIMARY ISSUES: Whether Grievant should have been allowed to retain his substitute position.

SUMMARY: Grievant, a substitute employee, was replaced when a regularly employed bus operator was allowed to "step up" into the position. Grievant asserted that since the employee he was substituting for had been placed in a temporary position, that employee was not absent, and the statute was not triggered. Respondent averred they corrected an error and correctly allowed a regularly employed bus operator to "step up." As the employee was not in his position - absent, and because regular employees receive positions over substitutes - Grievance DENIED.

KEYWORDS: EXTRA-DUTY ASSIGNMENT, SUBSTITUTE, POLICY T.3.8

CASE STYLE: LIPTRAP, ET AL. v. PUTNAM COUNTY BOARD OF EDUCATION
DOCKET NO. 07-40-315 (10/1/2008)

PRIMARY ISSUES: Whether Putnam County Board of Education Policy T.3.8 (1996) impermissible excludes part-time bus operators from taking extra-duty bus runs?

SUMMARY: Grievants aver that Putnam County Board of Education Policy T.3.8 (1996) violates West Virginia Code § 18A-4-8b and Article III § 10 of the West Virginia Constitution because the Policy does not allow part-time bus operators to take extra-duty bus runs. Further, in recognition of West Virginia Code § 18A-4-15, Grievants claim that the BOE erred when it permitted substitute bus operators to take extra-duty bus runs. Grievants generally seek an additional half-day of pay for each of the two days they were not permitted to take extra-duty assignments. Respondent BOE maintains that the Policy is not violative of West Virginia law and the BOE did not err in its promulgation or adherence to the Policy. Moreover, the Respondent maintains that even if error exists, the Grievants still may not be awarded back-pay as they have not met the requisite standard for such an award. For the reasons set-forth below, the grievance is DENIED.

KEYWORDS: INTERVENTION; MISTAKE; ERROR; COMPENSATION;
INTERVENOR'S CLAIMS FOR RELIEF

CASE STYLE: MULLINS v. MCDOWELL COUNTY BOARD OF EDUCATION
DOCKET NO. 07-33-076 (10/20/2008)

PRIMARY ISSUES: Whether the classification and salary supplement given to Intervenor was in error.

SUMMARY: Intervenor was given an incorrect classification, and paid an incorrect salary supplement. When the error was discovered, her classification and salary was changed to reflect the correct classification and salary. Intervenor was subsequently reclassified to her previous position of Payroll Supervisor after obtaining the necessary years of accounting experience. However, the salary supplement was paid in the absence of any policy authorizing that payment. Intervenor's claims for relief are DENIED.

KEYWORDS: PAY; NON-RELEGATION; MISTAKE; ERROR

CASE STYLE: TONEY v. LINCOLN COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0533-LINED (10/31/2008)

PRIMARY ISSUES: Whether Respondent properly altered Grievant's rate of pay for a supplemental bus run.

SUMMARY: At the end of the 2005-2006 school year, Grievant was employed to drive students on a supplemental bus run at a rate of 1/7th his daily rate. It is undisputed that this position should have been posted. This practice continued for a limited time from June 2006 through September 2006. In September 2006, the Respondent posted this position with the rate of pay at ten dollars per hour. Grievant bid for and was awarded this position under the terms of the posting. Grievant asserts that the change in the rate of pay violates the non-relegation clause of W. Va. Code § 18A-4-8(m). The error in paying Grievant at a rate of 1/7th his daily rate was corrected to be consistent with the September 5, 2006, posting under which other bus operators were awarded the supplemental bus runs. This action by Respondent did not violate the non-relegation clause. Grievant did not meet his burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle him to continue to receive a rate of pay awarded in error. This grievance is DENIED.

KEYWORDS: SELECTION; EXTRA DUTY; DISCRIMINATION; FAVORITISM; CREDIBILITY

CASE STYLE: BARLOW v. MERCER COUNTY BOARD OF EDUCATION
DOCKET NO. 07-27-163 (10/22/2008)

PRIMARY ISSUES: Whether Grievant should have been given an extra duty assignment.

SUMMARY: Grievant contends he should have been given an extra duty assignment, which was awarded to another bus operator who had the same potential schedule conflict as Grievant. Respondent argued that Grievant refused the trip, but the evidence did not support this contention. Grievant merely pointed out that he had a potential conflict, which the transportation secretary interpreted as a refusal of the assignment. She then offered the assignment to the next driver in line, who had the same conflict, but stated he would “work around it.”

Under these circumstances, Grievant and the other driver were similarly situated, and the difference in treatment was unrelated to their job duties, which were identical on the day in question, and was not in writing. Therefore, Grievant proved discrimination and/or favoritism. Grievance GRANTED.

KEYWORDS: SENIORITY, REDUCTION IN FORCE, HIRING, SELECTION

CASE STYLE: SANDERS v. LINCOLN COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0698-LinED (10/30/2008)

PRIMARY ISSUES: Whether Grievant was entitled to a position based on her preferred recall status and seniority.

SUMMARY: Grievant was one of at least two employees on a preferred recall list who filed grievances to force Respondent to fill position vacancies in a timely manner, and to allow her to take inservice classes and competency test for any positions she wished to apply for. During the pendency of this grievance, all the positions were properly filled with other applicants. Despite proving the position she seeks was filled improperly, Grievant did not prove she would have been the successful applicant if not for the error. On that basis, her grievance is denied.

<u>KEYWORDS:</u>	TERMINATION; DISMISSAL; INSUBORDINATION; WILLFUL NEGLECT OF DUTY; MITIGATION; PRIOR DISCIPLINE
<u>CASE STYLE:</u>	<u>GEHO v. MARSHALL COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2008-1395-MARED (10/30/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievant should have been terminated for insubordinate conduct and whether mitigation was appropriate?
<u>SUMMARY:</u>	Grievant's employment was terminated after an incident which occurred while he was performing his duties as a bus operator, driving students to a tennis practice at Wheeling Park. While waiting for the students to complete their practice, Grievant urinated from the bus stairwell into the parking lot of the facility. Although Grievant attempted to prove that his actions were caused by an uncontrollable medical condition, he failed to establish that his behavior should be excused. Because Grievant had several disciplinary actions in his work history and a less than exemplary performance record, Respondent did not abuse its discretion by determining that his employment should be terminated. Grievance DENIED.
<u>KEYWORDS:</u>	UNTIMELY; LEVEL THREE; TIMELINESS; EXCUSE
<u>CASE STYLE:</u>	<u>TONEY v. LINCOLN COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2008-0534-LINED (10/31/2008)
<u>PRIMARY ISSUES:</u>	Whether grievance was timely appealed to level three.
<u>SUMMARY:</u>	Respondent has proven by a preponderance of the evidence that the grievance should be denied on the basis that it was not timely appealed to level three. Grievant did not demonstrate a proper basis to excuse his failure to timely file a level three appeal. This grievance is DENIED.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	AT-WILL, CLASSIFIED EXEMPT, PUBLIC POLICY, STANDING
<u>CASE STYLE:</u>	<u>RUTLEDGE v. OFFICE OF MINERS' HEALTH, SAFETY & TRAINING</u> DOCKET NO. 2009-0010-DOC (10/31/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievant could use the Grievance procedure to challenge his demotion from an at-will position.
<u>SUMMARY:</u>	Grievant was dismissed from an at-will, classified exempt position, which he held at the discretion of the Director, and demoted to another position within the agency. Grievant did not allege the disciplinary action violated any public policy. Grievant is therefore without standing to challenge his dismissal through the grievance procedure, and his grievance must be denied.

<u>KEYWORDS:</u>	DISCRIMINATION, FAVORITISM, ULTRA VIRES, BACKPAY, DIFFERENCES IN PAY
<u>CASE STYLE:</u>	<u>BUCKLAND v. DIVISION OF NATURAL RESOURCES</u> DOCKET NO. 2008-0095-DOC (10/6/2008)
<u>PRIMARY ISSUES:</u>	Whether the difference in salaries of two employees in the same classification constituted discrimination or favoritism?. Whether an agency may be bound by the promise of an agent who does not have the authority to make the promise?
<u>SUMMARY:</u>	Grievant discovered that another employee in her classification was being paid a higher salary than she. Grievant claims that the difference in pay constitutes discrimination or favoritism. She failed to prove that the difference in pay was due to favoritism or discrimination. Additionally, Grievant alleges when she accepted the position with the DNR, she was promised that she would receive a five percent raise at the end of six months. The person who made the promise was not authorized to do so and DNR is not bound by it. Grievance DENIED.

KEYWORDS: DISCRIMINATION, GENDER, SEX, PAY

CASE STYLE: ROUSH v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS
DOCKET NO. 2008-0782-DOT (10/31/2008)

PRIMARY ISSUES: Whether DOH discriminated against the Grievant on the basis of sex by paying male coworkers in her classification more than she was earning for the same job.

SUMMARY: Grievant is one of nine employees in her section who are classified as Inspector 3. She and one other employee are the only women in this group. Grievant is paid the least of all these Inspectors even though she has more experience than four of them. Grievant contends that this disparity in pay is the result of sexual discrimination by the DOH. All the Inspectors are paid within the same pay grade. Grievant failed to prove that the difference in pay between the Inspectors resulted from discrimination. The grievance is DENIED.

KEYWORDS: DISMISSAL; LEAVE ABUSE; HARASSMENT

CASE STYLE: EICHELBERGER v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS
DOCKET NO. 2008-1027-DOT (10/7/2008)

PRIMARY ISSUES: Whether Grievant was properly terminated for abuse of leave.

SUMMARY: Grievant was terminated for a continuous pattern of leave abuse. Grievant had a long history of leave abuse, and had received a written reprimand and four suspensions. Despite numerous attempts at counseling sessions regarding reporting off from work, Grievant continued a pattern of leave abuse. Grievant asserted the agency's requirement to submit the necessary leave forms amounted to harassment. This assertion was not supported by the evidence. Department of Highways met its burden of proof and clearly demonstrated Grievant was terminated for good cause. This grievance is DENIED.

KEYWORDS: MISCLASSIFICATION, CLASSIFICATION, REALLOCATION, BEST FIT

CASE STYLE: GARRETSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF PERSONNEL SERVICES AND DIVISION OF PERSONNEL

DOCKET NO. 07-HHR-397 (10/22/2008)

PRIMARY ISSUES: Whether Grievant's position was properly classified as ASA 1 when compared to the ASA 3 classification?

SUMMARY: Grievant claims that her position is misclassified as an ASA 1 and should be properly classified as an ASA 3. Respondent DOP maintains that the ASA 3 classification is not the "best fit" for the Grievant's position and avers that the Claims Representative 2 ("Claims Rep. 2") classification is the proper fit.

The duties of the Grievant's position concern reviewing, evaluating and filing workers' compensation claims. When compared to the three classifications at issue, the Claims Rep. 2 classification is the "best fit."

For the reasons set-forth below, this grievance is GRANTED, in part, and DENIED, in part.

KEYWORDS: MISCLASSIFICATION, RECLASSIFICATION, REALLOCATION, CLEARLY WRONG / ERRONEOUS

CASE STYLE: LEPP v. INSURANCE COMMISSION AND DIVISION OF PERSONNEL

DOCKET NO. 2008-0987-DOR (10/21/2008)

PRIMARY ISSUES: Whether Grievant's position was properly reclassified.

SUMMARY: Grievant claims to be misclassified as a Credit Analyst III and seeks to be reallocated as a WC Credit Analyst Supervisor which is two pay grades higher. Grievant failed to prove, by a preponderance of the evidence, that her duties and responsibilities did not fit the CA 3 classification. The evidence failed to establish that DOP's determination was clearly erroneous, The grievance is DENIED.

KEYWORDS: REPRIMAND; COMPUTER USE; PAYROLL INFORMATION; CREDIBILITY; INSUBORDINATION

CASE STYLE: FERRELL v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS
DOCKET NO. 07-DOH-355 (10/27/2008)

PRIMARY ISSUES: Whether Grievant engaged in the conduct alleged; i.e. accessing payroll information in violation of agency policy?

SUMMARY: Grievant received a written reprimand for violation of DOH policies prohibiting unauthorized and improper use of computer information. During the processing of another grievance, it came to light that Grievant had assisted another employee, Matt Tuttle, in viewing the payroll information of Mike Felton, a DOH employee who had been selected for a position over Mr. Tuttle. Grievant denied the allegation at different times prior to and during the instant grievance proceeding, but also made statements to the effect that she should not have been punished for something that was a common practice of other employees, and they had not been informed that it was wrong to access such information.
Because only certain employees have official authorization to access payroll information, and Grievant had to use a "back door" method to do this, her conduct constituted insubordination, and the penalty of a written reprimand was appropriate. Grievance DENIED.

KEYWORDS: SELECTION, ARBITRARY AND CAPRICIOUS, PRESELECTION, BIAS

CASE STYLE: MURPHY v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS
DOCKET NO. 2008-0680-DOT (10/23/2008)

PRIMARY ISSUES: Whether the successful applicant was preselected for the position of SEC 2?

SUMMARY: Grievant alleges that the supervisor made it clear before the interviews were held, that he intended to fill the SEC 2 position with a particular applicant. She alleged that the predetermined outcome invalidated the selection process. There was insufficient evidence to prove that prior inappropriate comments, made by the supervisor, affected the ultimate outcome of the selection process. Nor was it proven that the process was biased and therefore arbitrary or capricious. The grievance is DENIED.

KEYWORDS: SUSPENSION; INSUBORDINATION; DUE PROCESS

CASE STYLE: HURT v. DIVISION OF REHABILITATION SERVICES
DOCKET NO. 2008-0245-DEA (10/24/2008)

PRIMARY ISSUES: Whether the disciplinary action taken was properly administered and whether the conduct by Grievant justifies the disciplinary action taken by Respondent.

SUMMARY: Grievant was disciplined for improper work behavior. It is the position of Respondent that Grievant's suspension for thirty days without pay was reasonable, and in fact required disciplinary action in accordance with the state's nondiscriminatory hostile workplace harassment policy, applicable Drug-and Alcohol-Free Workplace policy, and Grievant's insubordination behavior. Respondent can lawfully suspend an employee without pay to conduct an investigation; however, the period of suspension should not be abusive or in excess of the time period needed to collect and process pertinent information. Grievant's behavior is by no means ideal employee conduct. However, this does not empower Respondent with the ability to discipline an employee indiscriminately. In the facts of this case Respondent's actions were extreme. Further, it is not clear that Grievant was fully aware of the allegations of misconduct levied before she was removed from the work place. Grievance GRANTED in part and DENIED in part.

KEYWORDS: SUSPENSION; NOTICE; PROCEDURAL; "WORKING DAYS"

CASE STYLE: COFFMAN v. DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER
DOCKET NO. 2008-0120-MAPS (10/31/2008)

PRIMARY ISSUES: Whether Grievant received proper notice of his suspension.

SUMMARY: Grievant did not grieve the merits of the suspension, but rather argued he did not receive proper notice. Grievant asserted the term "working days" meant the days he actually worked. The definition of "working days" had previously been discussed and decided by the Grievance Board. "Working days" refers not to days when an employee is actually performing the duties and responsibilities of his or her job, but "refers to a work week comprising 'regular working hours,' defined by the employer, which in the instance of most West Virginia state government agencies, would be 8:30 a.m. to 4:30 p.m., Monday through Friday." Sheppard, supra. Grievance DENIED.